

GAO

Briefing Report to the Chairman,
Subcommittee on Environment, Energy,
and Natural Resources, Committee on
Government Operations, House of
Representatives

May 1987

SURFACE MINING

Office of the Solicitor
Fiscal Year 1986
Staffing Needs



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May 27, 1987

The Honorable Mike Synar
Chairman, Subcommittee on Environment,
Energy, and Natural Resources
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

This briefing report responds to your November 12, 1986, request that we examine the Department of the Interior's staffing of the Office of the Solicitor for fiscal year 1986 to carry out its surface mining-related activities. You were concerned that the Solicitor had not followed congressional direction to provide adequate legal support staff to carry out these activities. To address this concern, we agreed to determine (1) if available caseload statistics indicated an appropriate legal support staffing level, (2) how the Solicitor arrived at his staffing decision, and (3) whether current and former Office of the Solicitor officials agreed with the Solicitor's staffing decision.

Our examination of Office of the Solicitor caseload statistics revealed numerous minor inaccuracies. Most of the current and former officials we spoke to, however, believe that the statistics represent a reasonably close approximation of the actual caseload. The caseload statistics indicate that the backlog of open surface mining-related cases increased during fiscal year 1986. While this might suggest the need for additional legal staff, current officials in the Solicitor's Office contend that these statistics are misleading because most of the cases in the backlog were not ready for attorney involvement. These officials said that information on the financial status of coal operators who are the subject of the open cases must be available before they can proceed and that the Office of Surface Mining Reclamation and Enforcement (OSMRE) contractors had not provided the financial information in most cases.

OSMRE officials agree that their contractors have not provided this information in a timely manner but expect to have the needed financial information by December 1987. In the meantime, current Solicitor Office officials believed that waiting for OSMRE's contractors to supply this information was more cost-effective than using additional Office staff to collect it. The officials also believed that the delays associated with this approach would not materially affect the outcome of the cases. Accordingly, the Solicitor decided that additional staff could not have been productively used in fiscal year 1986. In anticipation of receiving the needed financial information this year, the Office is requesting a staffing increase to 77 full-time equivalent employees to work on surface mining-related activities in fiscal year 1988. This would be an increase of 12 from the Office's staffing estimate for fiscal year 1987. The additional staff will primarily be used to work on the caseload.

We also contacted former Office of the Solicitor officials who had overall responsibility for the caseload during most of fiscal year 1986. These former officials believed that court orders and congressional intent aimed at reducing the surface mining-related caseload mandated a more aggressive approach. While they endorsed the practice of obtaining financial information on coal operators from OSMRE's contractors, these former managers believed that Solicitor Office staff should be used to develop this information when the contractors failed to provide it in a timely manner. Further, they believed that waiting for this information causes the cases to get older which reduces the Interior Department's ability to resolve the cases to the government's satisfaction.

In summary, current Office of the Solicitor officials believe that additional staff could not have been productively used in fiscal year 1986 to work on surface mining-related activities. In their opinion, waiting for OSMRE's contractors to supply financial information on coal operators was more cost-effective than using additional staff from the Solicitor's Office and waiting for this information will not affect the outcome of the cases. Conversely, former Office of the Solicitor managers believe that additional staff should have been hired to more aggressively reduce the surface mining caseload. These former officials believe that the additional staff should have been used to obtain the financial information because waiting for OSMRE's contractors to provide this information

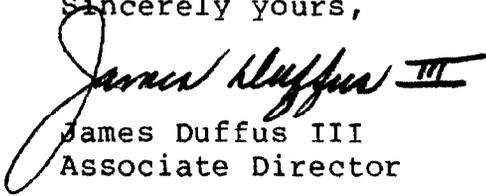
will hamper the Interior Department's successful resolution of the cases.

Our inquiry involved obtaining and reviewing Office of the Solicitor caseload statistics, budget documents, internal memoranda, and relevant congressional and court documents. To obtain additional information and views on the Office's staffing needs, we interviewed current and former Office of the Solicitor and OSMRE officials in Washington, D.C.; Pittsburgh, Pennsylvania; Knoxville, Tennessee; and Charleston, West Virginia.

The information in this report was first presented to your office in a briefing on March 26, 1987. We discussed the contents of this report with Office of the Solicitor officials to verify its accuracy. However, as you requested, we did not obtain official agency comments on a draft of this report.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to interested parties and make copies available to others upon request. If you have any additional questions or if we can be of any further assistance, please contact me at (202) 275-7756.

Sincerely yours,


James Duffus III
Associate Director

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ABBREVIATIONS

DSM	Division of Surface Mining
FTEs	full-time equivalent employees
GAO	General Accounting Office
NWDs	net worth determinations
OSMRE	Office of Surface Mining Reclamation and Enforcement
SMCRA	Surface Mining Control and Reclamation Act of 1977

SECTION 1

BACKGROUND

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) and subsequent implementing regulations set out a variety of mining and reclamation standards that coal operators must comply with in conducting their mining operations. These standards were established to prevent abusive mining practices that degrade land and water resources in the coal regions. In addition to protecting the environment against current abuses, the act requires operators to pay a fee--35 cents for each ton of coal produced by surface mining--into an Abandoned Mine Reclamation Fund to pay for the reclamation of mine sites abandoned prior to the act.

Operators who fail to comply with SMCRA's mining and reclamation standards or fee requirements are subject to a variety of civil and criminal sanctions. The most frequently used sanction is civil penalties (fines) assessed against a mining company. SMCRA also authorizes the use of a variety of alternative enforcement actions, including civil penalties against individual corporate officers, injunctions, and criminal prosecutions.

The Office of Surface Mining Reclamation and Enforcement (OSMRE), within the Department of the Interior, is the federal agency responsible for carrying out SMCRA's regulatory provisions. Since SMCRA was enacted, OSMRE has been responsible for regulating all mining activity on federal and Indian lands and in states that have not received federal approval to exercise primary regulatory responsibility.¹ In carrying out this responsibility, OSMRE periodically inspects mining operations, identifies mining violations, assesses appropriate civil penalties, and makes initial debt collection efforts. If these efforts fail to achieve abatement of the violation or do not result in the collection of the debt, OSMRE refers the case to the Office of the Solicitor within Interior. Within the Solicitor's Office, the Division of Surface Mining (DSM) is responsible for handling surface mining-related matters.

¹Twenty-four states have authority from the Department of the Interior to exercise primary regulatory responsibility in their states. In these states, OSMRE oversees state implementation of their programs to ensure compliance with SMCRA. Currently, OSMRE continues as the regulatory authority in Washington, Georgia, and Tennessee.

DSM's basic responsibilities include:

- pursuing penalty and fee collection and alternative enforcement litigation,
- providing legal support for OSMRE rulemaking efforts,
- assisting OSMRE in its oversight of state regulatory and abandoned mine land programs, and
- representing OSMRE in other litigation arising under SMCRA.

DSM has established a headquarters organization that parallels these functions. It has also established field offices in Knoxville, Tennessee; Pittsburgh, Pennsylvania; and Charleston, West Virginia. The DSM attorneys in these offices primarily handle debt collection and alternative enforcement cases.

The aggressiveness with which Interior has enforced SMCRA's regulatory provisions has been the subject of several court orders dating back to 1980. The most sweeping order was issued in December 1982 by Judge Barrington Parker. The Parker order (as it is commonly called) required Interior to assess and collect mandatory penalties against hundreds of coal mine operators who had violated SMCRA's regulatory provisions. In addition, the Department was ordered to pursue alternative enforcement action when mining violations remained unabated. Facing a possible motion for contempt for failing to satisfactorily implement the provisions of the court order, in October 1984 Interior and the plaintiffs negotiated a modification of the order. This agreement was approved by the court in January 1985. Among other things, the agreement requires Interior to determine the net worth of coal operators who had received a "failure to abate cessation order"² prior to the January 1985 court order. If these net worth determinations (NWDs) demonstrate that the coal operator has assets (corporate assets of any amount or personal assets over \$50,000), Interior is required to expeditiously initiate debt collection actions and pursue alternative enforcement litigation.

To help carry out its legal responsibilities under the act and subsequent court orders, Interior in its fiscal year 1986 budget submission requested 81 full-time equivalent employees (FTEs) to support DSM's activities. This budget request was prepared in 1984, approximately 1 year before the current Solicitor's appointment. However, during fiscal year 1986, only 60.5 FTEs were

²If operators cited with a violation do not correct the violation within a specified time period, normally within 90 days, they are issued a failure to abate cessation order to stop all or a portion of the mining and assessed a mandatory penalty of not less than \$750 for each day the violation continues.

assigned to DSM to support OSMRE activities. In response to concerns raised by the Chairman of the Subcommittee on Interior and Related Agencies, House Committee on Appropriations, on June 27, 1986, the Solicitor acknowledged that the Congress intended DSM to achieve a staffing level of 81 FTEs but nonetheless concluded that DSM should not be staffed to that level because the work load did not justify it. He further stated that staffing to that level would be a detriment to other Office activities.

Subsequently, on September 16, 1986, the Chairman of the Subcommittee on Environment, Energy, and Natural Resources, House Committee on Government Operations, asked us to examine Office of the Solicitor expenditures in fiscal year 1986. In November 1986 we reported³ that although the Solicitor's Office obligated about \$1.3 million less than originally estimated for surface mining matters in 1986, the Solicitor was legally free to determine how the funds were to be distributed among the various programs and activities he was authorized to conduct. We also reported that the Solicitor said that the legal work load associated with surface mining matters did not justify the expenditures of additional resources.

The Subcommittee Chairman, concerned that DSM had a large backlog of surface mining-related cases, then asked us to look further into the work load issue. On November 12, 1986, we agreed to (1) examine available caseload statistics, (2) determine the Solicitor's basis for his staffing judgments in view of the large backlog, and (3) obtain current and former DSM officials' views on DSM's staffing needs. The following sections address these objectives.

³Financial Management: Information on Expenditures by Interior's Office of the Solicitor, (GAO/AFMD-87-16FS, November 1986).

- DSM maintains quarterly caseload statistics based on monthly field reports.
- Our analysis of the caseload statistics revealed numerous errors.
- Nearly all current and former DSM officials we interviewed believe that the statistics represent a reasonably close approximation of the DSM caseload.
- The data show that during fiscal year 1986 the case backlog increased from fiscal year 1985 levels.
- Current Solicitor officials believe that only those cases ready for attorney involvement should be considered when making judgments about required staff levels.

SECTION 2

CASELOAD STATISTICS

Surface mining-related caseload statistics maintained by the Office of the Solicitor do not provide conclusive evidence to support or refute the Solicitor's conclusion that work load was insufficient to justify DSM staffing at the 81 FTE level. Although we identified numerous inaccuracies in the data base, the managers we spoke with, both current and former, said that the statistics were at least in the ballpark. The statistics indicate that the caseload backlog increased somewhat during fiscal year 1986. Solicitor officials disagree, however, as to whether this information provides a meaningful indicator of the need for additional staff.

DSM's field attorneys submit monthly reports to the headquarters' Branch of Enforcement and Collections. These reports display new case referrals, cases filed, judgments obtained, amounts collected, and the pending caseload. The monthly reports are then compiled and summarized into quarterly reports by the Branch of Enforcement and Collections.

Our analysis of the caseload statistics maintained by the Solicitor's Office at the time fiscal year 1986 staffing decisions were being made revealed numerous errors. The problems we found included errors in the monthly reports submitted by the attorneys in the field, mistakes in compiling this data, lack of data updates, and arithmetic errors. These errors were also reflected in the quarterly reports on DSM work load that the Solicitor forwarded to the House Committee on Appropriations as required by H. Rept. No. 99-205. Further, the reports often overstated fiscal year cumulative collection activities as quarterly accomplishments. Although the current Assistant Solicitor for Enforcement and Collections acknowledged that the caseload statistics contain numerous errors, he and nearly all current and former DSM officials we interviewed believe that the statistics represent a reasonably close approximation of the DSM caseload.

The data show that during fiscal year 1986 the backlog of collections and enforcement cases increased from fiscal year 1985 levels. Pending collection cases rose from 2,163 to 2,232 during the year and pending enforcement cases rose from 841 to 912 from the end of the first quarter to the end of the fiscal year (pending enforcement caseload figures were not available for the beginning of the fiscal year). Taken at face value, the increasing backlog might suggest the need for additional staff.

Current Solicitor officials maintain, however, that the picture presented by a review of such raw data is not accurate or instructive. They believe that when making judgments about

required staff levels, it is important to consider only those cases that were actually ready for attorney involvement. To this end, they believed most of the cases in the backlog were not ready for attorney involvement because OSMRE had not provided all the documentation necessary to proceed. Further, they believed the cases that were ready for action could be handled with available staff.

- According to current Solicitor officials, the Solicitor's staffing decision was based on budgetary constraints and work load considerations.
- The Solicitor concluded that most cases in the backlog could not be worked on until OSMRE's contractors provided the NWDs.
- As of May 4, 1987, OSMRE has only received about 1,250 of the 4,400 NWDs ordered.
- Pending receipt of these NWDs, current Office of the Solicitor officials believe the actual caseload that could be worked on was manageable and could be handled without hiring additional staff.

SECTION 3

SOLICITOR'S JUSTIFICATION FOR HIS STAFFING DECISION

According to current Office of the Solicitor officials as well as the Solicitor's congressional testimony and internal memoranda, the Solicitor based his decision not to increase DSM's staffing to the 81 FTE level in fiscal year 1986 on two primary factors. First, he said that his budget did not provide sufficient funds to support the higher staffing level. Second, he said that while caseload statistics showed a large backlog of cases, his managers believed the statistics to be misleading because most cases in the backlog could not be processed until the net worth of the coal operators involved was determined by OSMRE contractors. The chronology of events which in the Solicitor's view led to his staffing decision is outlined below.

Shortly after the current Solicitor assumed his position on December 22, 1985, (3 months after fiscal year 1986 began and 3 days after the Office's appropriations for the remainder of fiscal year 1986 were enacted), he found that the Office was facing fiscal problems. According to the Director of Administration, the Office's budget justification (prepared in 1984) was internally inconsistent in that the funding Interior had requested was insufficient to support its requested staffing level. This budgetary problem became more acute when the Balanced Budget and Emergency Deficit Control Act reduced the Solicitor's Office appropriation.

Faced with this budgetary problem, the Solicitor on January 16, 1986, requested the Associate Solicitor, DSM, to prepare a written briefing paper describing how the Associate Solicitor planned to accomplish legal support for OSMRE. In response, the Associate Solicitor prepared a memorandum entitled "DSM Plan to Provide Legal Support for the Office of Surface Mining Reclamation and Enforcement." In this memorandum, the Associate Solicitor assumed that DSM would be staffed at the 81 FTE level intended by the Congress and outlined how additional staff would be used.

The Solicitor was not satisfied with the Associate Solicitor's response because he wanted the plan to describe how the Associate would organize DSM for maximum efficiency if he were to receive no additional resources, and starting from this baseline, describe how he would use additional resources to reduce DSM's caseload backlog. Accordingly, on February 3, 1986, the Solicitor requested the Associate Solicitor to develop a management plan that would reflect the current work load, staffing, and productivity levels; project what the caseload would be in 6 months; and on this basis, arrive at an appropriate staffing level.

In response, on February 28, 1986, the Associate Solicitor submitted to the Solicitor a draft entitled Report on DSM Organization and Workload. While this report discussed "no-hire" options, it concluded that DSM's primary problem remained the lack of sufficient resources to accomplish its objectives and reiterated the need to hire additional personnel in DSM field offices and in the Regulatory Programs Branch, as outlined in the earlier memorandum. On March 28, 1986, the Solicitor wrote the Associate Solicitor that the draft was also inadequate in part because

". . . your managers have not been a part of the development of your reports. This assumption is given further credence when I review your reports and find apparent inconsistencies and inaccurate statements."

He further stated that based on information he obtained from managers in the field, only seven attorneys and clerical staff should be hired, and that they should be assigned to the Knoxville Enforcement and Collections Units.¹

According to the Solicitor's Director of Administration, the Solicitor held a meeting in early April 1986 with DSM's Associate, Deputy Associate, and Assistant Solicitors to assess DSM's overall staffing needs. According to the Director, only the Assistant Solicitor for Regulatory Programs expressed the need for additional staff, a secretary, which the Solicitor later hired.

According to Office of the Solicitor officials, as a result of this and other discussions, the Solicitor concluded that most cases in the backlog could not be acted upon without additional information, specifically NWDs, on the coal operators involved.

In material supplied by the Office of the Solicitor in 1986 testimony before the House Appropriations Committee, DSM noted that it had received fewer NWDs than anticipated from OSMRE. OSMRE officials attributed the delays to poor contractor performance. OSMRE began contracting out the NWD work in fiscal year 1985 and since then has used several different contractors. Due to continuing performance problems, OSMRE terminated its NWD order with its most recent contractor and is currently without a contractor. As of May 4, 1987, OSMRE has only received about 1,250 of the 4,400 NWDs ordered. OSMRE is currently in the process of obtaining a new contractor and expects to receive the 3,150 outstanding NWDs by December 1987.

¹The Solicitor hired these seven and an additional two staff during the fiscal year; due to past and continuing attrition, however, the Knoxville office gained a net of only two additional positions during the fiscal year.

Pending receipt of these NWDs, current Office of the Solicitor officials believe the actual caseload that could be worked on was manageable and could be handled without hiring additional staff. They further said that using contractors to prepare the NWDs was cheaper than using either additional attorneys or paralegal staff. Finally, since most of the cases involved were already several years old, these officials did not believe additional delays incurred by waiting for the NWDs would have much practical effect on Interior's ability to collect the owed debt or achieve other enforcement goals.

Because the Solicitor expects the NWDs to arrive this year, the Office is requesting a DSM staffing increase to 77 FTEs (an increase of 12 from the Solicitor's staffing estimate for fiscal year 1987) in fiscal year 1988. The additional staff will primarily be used to handle the increased enforcement and collections that will be ready for attorney involvement.

- Several former DSM managers' recollection of events differs from the Solicitor's. In particular, they maintain that
 - headquarters and field managers had been involved in developing the Associate Solicitor's staffing plans and
 - they reiterated the need for additional staff during the April 1986 meeting with the Solicitor.
- While endorsing the practice of obtaining NWDs from OSMRE contractors, they believe that
 - if NWDs are received at a slow rate and/or are of poor quality, then additional staff should be hired to obtain or supplement this information and
 - waiting for the NWDs will hamper Interior's ability to collect debts and achieve reclamation.

SECTION 4

FORMER DSM OFFICIALS' VIEWS ON THE SOLICITOR'S

STAFFING DECISION

Several former DSM managers expressed views about DSM staffing needs that were contrary to the Solicitor's. They also had a different recollection of the events that led to the Solicitor's conclusion that additional DSM staff should not be hired. Specifically, they maintain that (1) headquarters and field managers had been involved in developing the Associate Solicitor's staffing plans and (2) they reiterated the need for additional staff during the April 1986 meeting with the Solicitor. In short, these officials believed that 81 FTEs could have been productively used by DSM in fiscal year 1986 and that a way should have been found to comply with the Congress' intentions on the matter.

During our review, we talked with the former DSM Associate and Deputy Associate Solicitors and the former DSM Assistant Solicitor for Enforcement and Collection.¹ Essentially, these officials believed that the Solicitor should have staffed DSM to the level intended by the Congress and that this 81 FTE complement was needed to aggressively pursue the existing backlog of enforcement and collections cases as mandated by the court orders. These former officials also said that, contrary to the Solicitor's contention, headquarters and field managers had been involved in developing the Associate Solicitor's plan for using the 81 positions and that these managers essentially agreed with the plan. Specifically, the former Deputy Associate Solicitor (who played a major role in developing the Associate Solicitor's plans) maintains that he obtained and incorporated the Knoxville and Pittsburgh Field Solicitors' views on staffing needs into the plans submitted to the Solicitor. (He did not consult the Charleston Field Office because that staff is not funded out of the Solicitor's budget.)

We discussed this different recollection of the facts with the Knoxville Field Solicitor who said that he was asked to provide comments on the plans several months after they were prepared but was not involved in their development. He believes that staffing decisions are essentially up to DSM headquarters officials and that when told that DSM was planning to provide Knoxville with additional staff he responded that he could put them to productive use. While he believes that the additional staff would have enabled him to more rapidly reduce the case backlog, he does not

¹The Associate and Assistant Solicitors left Interior in July 1986. The Deputy Associate Solicitor was assigned new duties within DSM in May 1986.

believe that an additional year delay awaiting NWDs will adversely affect collection or enforcement efforts.

We also attempted to obtain the views of the Pittsburgh Field Solicitor, but this person is no longer with Interior and was not available to confirm the former Deputy Associate's claim that he was involved in developing the hiring proposal. The Acting Field Solicitor who replaced the Pittsburgh Field Solicitor in early fiscal year 1986, stated that she was not consulted by the former Associate or Deputy Associate Solicitor about staffing needs. However, she did tell the former Assistant Solicitor, Enforcement and Collections, that the office needed two or three additional support staff and, if obtained, could reduce its attorney staffing level by one or two positions.

The former Associate and Deputy Associate Solicitors and the Assistant Solicitor for Enforcement and Collections disagreed with the Director of Administration's description of the purpose and content of the Solicitor's April 1986 meeting. They maintained that the actual purpose of the meeting was to prepare the Solicitor for an anticipated "grilling" before the Congress. According to these officials, they told the Solicitor that if he was confronted by the Congress about his staffing decision, he could use the lack of available NWDs as an excuse for not hiring 81 FTEs. While volunteering this tactic, the former managers nonetheless said that they made it clear that they believed the additional staff were still needed.

While these former officials endorsed the practice of obtaining NWDs from OSMRE contractors, they believed that if NWDs are received at a slow rate and/or are of poor quality, then additional staff should be hired to obtain or supplement the asset information until the problems are resolved with the contractor. If, on the other hand, the rate and quality of the determinations are adequate, additional staff would be needed to work on the cases. They believe that as the cases get older, Interior will have less success in collecting debts and achieving reclamation. Accordingly, these former officials believe that taking the passive posture of waiting for the NWDs is inappropriate.

Current staff attorneys we spoke with agreed that the timeliness and quality of the NWDs has historically been poor. Several attorneys described them as "worthless," of "poor quality," or "inadequate." One of the problems the attorneys raised was that the most recent contractor did not conduct field searches to determine assets and as a result the NWDs were often incomplete and/or inaccurate. According to most of the staff attorneys we spoke with, they would prefer either obtaining the asset information themselves or have dedicated staff under their direct supervision perform the work.

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